IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BONNIE J. BENZIES,

Petitioner,

v.

ILLINOIS DEPARTMENT OF MENTAL HEALTH & DEVELOPMENTAL DISABILITIES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether a plaintiff in a Title VII case who proves the employer's proffered explanation to be unworthy of credence and therefore pretextual proves intentional discrimination as a matter of law?

LIST OF PARTIES

The original parties in the district court were the plaintiff Bonnie J. Benzies and the defendants Illinois Department of Mental Health and Developmental Disabilities, Lawrence Appleby, Ray Finkle, and Dennis Headley. The individual defendants were dismissed before trial. Bonnie Benzies and the Illinois Department of Mental Health were the only parties in the Court of Appeals.

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Petitioner, BONNIE J. BENZIES, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on January 28, 1987.

OPINION BELOW

The opinion of the Court of Appeals is reported at 810 F.2d 146 (7th Cir. 1987). The opinion is attached as an appendix hereto, p. 1a, *infra*. Also attached is the unreported Findings of Fact, Conclusions of Law and Final Order of the District Court, p. 7a, *infra*.

JURISDICTION

The opinion of the Court of Appeals was issued on January 28, 1987. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 42 U.S.C. § 2000e-5(P)(3) and the Court of Appeals pursuant to 28 U.S.C. § 1291.

STATUTE INVOLVED

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employment practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Dr. Bonnie J. Benzies is a clinical psychologist. She worked as a clinician for the Illinois Department of Mental Health for twelve years, the last six of which were spent at Manteno, a large mental hospital that the State closed in 1985. By 1977, she had attained the rank of Psychologist III, the rank she still held in December of 1982, when she resigned in protest. No woman psychologist in the fifty years of Manteno's existence ever advanced beyond the clinical position of Psychologist III. The district court found that it "stretches the court's credulity that during that whole period of time no woman engaged in clinical practice was qualified for the position of Psychologist IV or the position of Supervising Psychologist I."

In 1978 and 1979 Dr. Benzies applied for the position of Psychologist IV in other divisions of the hospital. On both occasions, she was told that the other applicants held Ph.D. degrees in psychology and would be chosen over her. Since a Ph.D. seemed necessary for advancement, Dr. Benzies completed her doctorate in psychology. She taught graduate courses in psychology and published in her field. An evaluation of Dr. Benzies's job performance at Manteno indicated that she was doing excellent work there as well.

Doctor Benzies's allegation of sex discrimination exclusively concerned Manteno's misuse of the device of "audit and upward allocation" for personnel advancement. In an audit the State Bureau of Personnel examines the assigned duties attached to a particular position. The audit decision is only concerned with the determination of the proper classification of the position. Therefore, factors such as current work load, performance evaluations, educational

background, experience and seniority, do not influence the audit result. The auditor reaches his conclusion by comparing the duties assigned to a particular position to State Department of Personnel job specifications to determine what personnel category a particular position most closely resembles. The individual institution defines the specific duties assigned to a position and places a particular person in that position. Upward allocation occurs when an individual assigned to an audited position follows the upgrade of the position to a higher rank. There was testimony that State personnel rules provide that the individual in a position "allocated" upward automatically and without competition moves up to the higher rank with the position, at least when "qualified." Where the method of audit and upward allocation is employed to effect personnel advancement, the individual institution can determine who shall advance by the assignment of particular duties to a given position newly occupied or currently held by a particular individual.

Between August, 1981, and June, 1982, four men were promoted to the position of Supervising Psychologist I by audit and upward allocation, while Dr. Benzies's audit left her at the Psychologist III level. The defendant's proffered non-discriminatory reason for promoting the men over Benzies was that the mechanical operation of state civil service rules *required* that result. Dr. Benzies sought to prove that the latter explanation was not worthy of credence.

The district court found that one of the men promoted, Ray Finkle, was transferred to Dr. Benzies's ward with the specific intention of advancing him to the position of Supervising Psychologist I. (App., p. 9a). Before Finkle's arrival Dr. Benzies was in line to receive the assignment of the nominal supervisory responsibilities over the other

psychologists in the ward that constituted the key element in the higher positions, Psychologist IV and Supervising Psychologist I.

Dennis Headley, the director of Subregion 12, testified that once Finkle became supervising psychologist Dr. Benzies would not advance in her unit because each such unit is only allotted one supervising psychologist. By contrast, Finkle's transfer allowed G. David Das, a male, to receive supervisory duties in Finkle's former ward. In this way Das, the male, could be audited up to the position of Supervising Psychologist I in 1982, a move that Finkle's transfer would block for the female, Benzies.

With respect to Finkle's transfer, the district court found that the respondent never explained "[h]ow an upward allocation can be made without a pre-existing, budgeted vacancy," which might be announced for competitive application. (App., p. 12a). The court further found that Mr. Headley had given an "unconvincing explanation" of the coincidence of Finkle's job description and the job specifications for Supervising Psychologist I. Furthermore, and most importantly, the court found it "a fair inference from all the circumstances that the audit was solicited by [superiors] . . . and that Finkle was transferred into Subregion 12 with the specific intention of advancing him to the position of Supervising Psychologist I." (App., p. 9a).

This was a crucial finding. For the defendant's proffered non-discriminatory reason for the promotion of Finkle and Das, two of the four men promoted over Benzies, was that "it was *required* to advance the male candidates by reason of personnel rules and civil service requirements in the State of Illinois." (App., p. 7a). If Finkle's transfer to Benzies's ward was effected "with the specific intention of advancing him," the defendant was not *required*

to advance Finkle (and Das) by the mechanical operation of rules, as the defendant had claimed. Those rules merely provided the terrain on which the defendant could effect its discriminatory strategy. As regards Finkle at least, the district court found the respondent's explanation regarding his promotion to be unworthy of credence.

In 1982, another male, Frederick Slate, was promoted to Supervising Psychologist I by audit and upward allocation. At the time Finkle had been placed in Benzies's ward, Slate had been almost a year behind Benzies's progress towards the doctorate. Still Finkle was given the nominal supervisory duties over Benzies, not over Slate. Thus Slate could advance and Benzies could not. Finally, Manteno submitted an audit for Jack Emmons, who, like Finkle, held only a master's degree. Emmons had never been a registered psychologist in Illinois, although the district court clearly erroneously found that he was. (App., p. 12a).

The record also indicated that the institution tailored its description of the educational qualifications for the Supervising Psychologist I position to meet the actual backgrounds of the men it sought to promote. Though State specifications for the Supervising Psychologist I position required "knowledge, skill, and mental development equivalent to completion of four years of college supplemented by Doctor of Philosophy degree in Psychology," Finkle's superiors, writing in support of his upward allocation, asserted that only a master's degree was necessary. Finkle had only a master's degree. When Manteno submitted its audit for Jack Emmons, it again asserted that only a master's degree was necessary. Emmons's master's degree was, additionally, not even in psychology, but in social work. Accordingly, the hospital checked the box on the audit form indicating that the Supervising Psycholo-

gist position required only a master's degree and "a certification in social work *or* psychology." (emphasis added). On the other hand, the two other males, Das and Slate, had, by the time they submitted their audits, completed their doctorates and become registered in psychology. This time the institution checked the Ph.D. box on the minimum formal education question on the audit form and required further that the candidate "must be a registered psychologist."

Benzies remained a Ph.D. psychologist and, after April, 1982, a registered psychologist at Manteno with the rank of Psychologist III until she resigned, and Manteno continued to have no woman clinician in a supervising psychologist rank. Another male, William Morgan, held the Supervisory Psychologist I position though his highest degree was a master's in music. Two other males, Slate and Kover, were *hired* at the Psychologist III rank. A male Ph.D., Paul Finkle, was advanced to Supervising Psychologist *II* by upward allocation in June, 1981. Another male with *a bachelor's degree* and with less clinical experience than Dr. Benzies held the same rank, Psychologist III, as of February, 1981. When a male psychologist with a master's degree, Alan Hillman, complained of failure to promote him beyond Psychologist III, the institution agreed to a settlement of over $8,200. No such settlement was offered to Dr. Benzies, nor did Mr. Headley make a request for a salary adjustment. Manteno's Personnel Officer could only agree that classifying Dr. Benzies as Psychologist III while social workers were classified as Supervising Psychologist I's "[o]n the face of it, yes, it appears to be . . . an inequity."

In sum, the institution claimed that it had not planned the advancement of the men; the mechanical operation of State personnel rules alone accounted for it. The district

court found that explanation unworthy of credence, going so far as to find that a hospital official had testified falsely about his responsibility for commencing Finkle's audit. (App., p. 9a). Nonetheless, the district court entered judgment for the defendant because it could not "conclude that the specific intention to discriminate against the plaintiff is more probably true than not true." (App., p. 13a). In setting the "ultimate issue" for itself, the district court articulated what it took to be the appropriate standard under this Court's decisions in the following terms:

> The plaintiff then has the ultimate burden of persuading the court that the reasons advanced are a pretext *and* that a substantial or motivating factor in the defendant's decision was discrimination and but for that discrimination, the plaintiff would have been appointed.

(App., p. 11a). [emphasis added]. The district court's formulation of the ultimate issue approximates the "direct" method of proving pretext under this Court's rulings.

Petitioner argued on appeal that the district court had committed an error of law by articulating and considering the evidence only in light of the direct method of proving pretext. The district court neither articulated the indirect method, under which the plaintiff may succeed in establishing pretext, and so intentional discrimination, by showing only that the employer's proffered explanation is unworthy of credence, nor evaluated the evidence in light of that method. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Petitioner argued further that, under the actual findings of fact that the district court had made, that she should have been entitled to judgment.

The Court of Appeals, writing through Judge Easterbrook, joined by Judges Posner and Parsons, first acknowl-

edged, but then misstated Petitioner's legal argument. The district court had ruled that the ultimate issue was whether plaintiff had persuaded "the court that the reasons advanced are a pretext *and* that a substantial or motivating factor in the defendant's decision was discrimination and but for that discrimination, the plaintiff would have been appointed." The Court took Petitioner to be arguing that the first "and" in the district court's formulation should have been an "or." (App., p. 2a).

Rather, Petitioner had argued that the correct formulation of the ultimate issue under *Burdine* is whether the plaintiff has proven *pretext* "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the proffered explanation is unworthy of credence." 450 U.S. at 256.

The Court of Appeals first ruled that its misstated version of Petitioner's argument did "not make any difference" (App., p. 3a) since the district court had not even found pretext, and so hardly intentional discrimination itself. This was true, but it begged precisely the legal question that the case raised: whether a plaintiff may prove pretext indirectly, a possibility the district court did not consider. Perhaps suspecting as much, Judge Easterbrook continued in the following terms:

> Just in case, we add that Benzies is wrong on the law. The plaintiff must show that intentional discrimination caused the employer to take some unfavorable action. See *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Germane v. Heckler*, 804 F.2d 366, 368 (7th Cir. 1986). To have any hope of showing this, the plaintiff must puncture a neutral explanation the employer offers for its conduct. Benzies argues that if the plaintiff does so—in the argot,

> shows that the explanation is a "pretext"—then the district court must infer that the employer acted with discriminatory intent. Not so. A demonstration that the employer has offered a spurious explanation is strong evidence of discriminatory intent, but it does not compel such an inference as a matter of law. The judge may conclude after hearing all the evidence that neither discriminatory intent nor the employer's explanation accounts for the decision.
>
> A public employer may feel bound to offer explanations that are acceptable under a civil service system, such as that one employee is more skilled than another, or that "we were just following the rules." The trier of fact may find, however, that some less seemly reason—personal or political favoritism, a grudge, random conduct, an error in the administration of neutral rules—actually accounts for the decision. Title VII does not compel every employer to have a good reason for its deeds; it is not a civil service statute. Cf. *Christie v. Foremost Insurance Co.*, 785 F.2d 584, 587 (7th Cir. 1986). Unless the employer acted for a reason prohibited by the statute, the plaintiff loses. The failure of an explanation to persuade the judge supports an inference that a bad reason accounts for the decision, but it is not invariably conclusive; the presence of a sufficient explanation, however, is dispositive against the plaintiff. (A "sufficient" explanation is one that would produce the same decision whether or not the prohibited characteristic played some role.)

(App., pp. 3a-4a). Since the district court had found the proffered explanation unworthy of credence, yet had held for the defendant on the grounds that plaintiff had not demonstrated the specific intention to discriminate, the district court's holding could only be affirmed on the basis of the rule that Judge Easterbrook enunciated "[j]ust in case." (App., p. 3a).

The district court did not label its findings that Finkle had been transferred with the specific intention of advancing him and that Headley had falsely denied his responsibility for Finkle's audit as a finding that the defendant's proffered reason was unworthy of credence. Since it had enunciated a rule under which pretext could be proven only directly, it could not appreciate the legal significance of its own finding.

Apparently troubled by this aspect of the district court's opinion, the Court of Appeals offered an explanation other than the simple one, mistake of law. The Court of Appeals suggests in closing that "[t]he district judge did not explicitly discuss the reasons the men were assigned the duties that made promotions possible, while Benzies was not." (App., p. 5a). This simply is not so, at least with regard to the crucial transfer of Finkle: there the district judge found that Finkle was given his new duties "with the specific intention of advancing him to the position of Supervising Psychologist I." (App., p. 9a).

The Court of Appeals went on to blame the pretrial order rather than the district court's legal error for its failure to assess the defendant's proffered reason under the "unworthy of credence" rubric. The pretrial order could not detail every sub-issue of evidentiary fact, but neither the district court nor the parties objected to that. Among the stated contested issues were the following:

> Whether the plaintiff is more qualified for the position of Supervising Psychologist I than the men who were upwardly allocated to said positions.
>
> Whether the positions of Psychologist IV were audited because men were in those positions.
>
> Whether the Department of Mental Health and Developmental Disabilities of the State of Illinois caused males rather than females to be upwardly allocated through job audits.

> [Whether] [d]efendant used the audit system to prevent competitive bidding on supervisory positions in the Psychology Department.
>
> [Whether] [d]efendants have discriminated against women by failing to promote and place them in high level psychologist positions.

(Final Pretrial Order pp. 4-5). Much of the oral evidence and the two volumes of exhibits went precisely to the facts surrounding the transfer of Finkle and the relative superiority of Benzies's qualifications to those of the males. The defendant's proffered reason was that it was *required* to advance the men by mechanical operation of Civil Service rules. The issue of whether that explanation was worthy of credence was clearly before the district court. Thus, it was that court's error of law, and not the pretrial order, that made that issue legally irrelevant.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND DECISIONS IN OTHER CIRCUITS.

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court held that a plaintiff could prove discrimination by proving at the third stage of a Title VII trial that the employer's explanation for its action was pretextual. 450 U.S. at 256. Pretext, in turn, may be proved "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly, by showing that the employer's proffered explanation to be unworthy of credence." 450

U.S. at 256. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973). This Court's decision in *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983) reaffirmed the *McDonnell Douglas—Burdine* framework, including the availability of the indirect method of proving pretext and thus discrimination. 460 U.S. at 718 (Blackmun, J., concurring).

This Court's development of its precedents in this area represent a careful accommodation to the fact that, in Title VII disparate treatment cases, the plaintiff must attempt to prove facts relating to intent that are by nature both sensitive and difficult and often within the sole possession of the employer. Each stage refines the factual inquiry, and elevates it to a new level of specificity, until, at the third and final stage, the court is prepared to decide the ultimate question of discrimination, fully merged with the specific issue of pretext. If the plaintiff proves that the proffered reason is pretextual, either directly or indirectly, she then prevails as a matter of law.

The *Benzies* opinion seizes upon inapposite language in *Aikens* to seek to dismantle the legal structure for the trial of disparate treatment cases that this Court has so carefully and recently built. Instead of a sequence channeling a district court's inquiry to ever greater levels of specificity, *Benzies* requires a plaintiff who has arrived at the third and final stage of the sequence, and who has proven that the defendant's proffered reason is unworthy of credence, to go on to prove that every other possible reason is false. Under Judge Easterbrook's formulation, a plaintiff who has proved that the defendant's proffered reason is unworthy of credence would have to show directly that intentional discrimination actually motivated the defendant. That, however, would not be enough: even if racial or gender-based discrimination played "some role"

(App., p. 4a), the plaintiff would have to prove that no other explanation, whether or not raised by the defendant, or even if denied by the defendant under oath, could have produced the same decision. (*Id.*) Under the Court of Appeals' formulation, the following holding by a district court judge would be fully consistent with the law:

> I find that the defendant fired the plaintiff in part because the latter is black. The defendant testified that the firing was because of poor job performance, but I find that the latter was intentionally false testimony and is unworthy of credence. Still I conclude that the "grudge" that the defendant bears toward the plaintiff and defendant's political favoritism toward plaintiff's replacement, both of which defendant denied, would have produced the same result and so I find for the defendant.

Benzies thus turns the *Burdine* framework into an exercise in futility and, in effect, allows plaintiffs to succeed in cases where there has been only the most verbally explicit racial or gender-based discrimination. The Court of Appeals would require the parties to clarify and specify the factual issues through the three-step sequence only to return to the place where they started, and would counsel a district court at the third stage to rummage through the record in an attempt to find non-discriminatory reasons presented by neither party. *Benzies* departs so sharply from *Burdine* and represents such a serious erosion of plaintiff's rights under Title VII that review by this Court is appropriate and necessary.

The Court of Appeals opinion in *Benzies* is in conflict with recent decisions in the Second, Fourth, Fifth, Sixth, Seventh, Ninth and Tenth Circuits.[1] Review by this Court

[1] *See, e.g., Schmitz v. St. Regis Paper Company*, 811 F.2d 131 (2nd Cir. 1987); *Monroe v. Burlington Industries, Inc.*, 784 F.2d 568

(Footnote continued on following page)

is necessary to resolve the conflict in the vital area of discrimination law.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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[1] *continued*
(4th Cir. 1986); *Sylvester v. Callon Energy Services, Inc.*, 781 F.2d 520 (5th Cir. 1986); *Tye v. Board of Education of Polaris Joint Vocational School District*, 811 F.2d 315 (6th Cir. 1987); *Yarborough v. Tower Oldsmobile, Inc.*, 789 F.2d 502 (7th Cir. 1986); *Christie v. Foremost Insurance Co.*, 785 F.2d 584 (7th Cir. 1986); *Kimbrough v. Secretary of United States Air Force*, 764 F.2d 1279 (9th Cir. 1985); *E.E.O.C. v. Gaddis*, 733 F.2d 1373 (10th Cir. 1984).

Only the Third Circuit is in accord with *Benzies* in erroneously requiring direct evidence of discrimination. *See Lewis v. University of Pittsburgh*, 725 F.2d 910 (3rd Cir. 1983), *cert. denied*, 469 U.S. 892 (1984).

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-1240

BONNIE J. BENZIES,

Plaintiff-Appellant,

v.

ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois, Danville Division.
No. 82 C 2369—**Harold A. Baker**, *Chief Judge.*

ARGUED JANUARY 5, 1987—DECIDED JANUARY 28, 1987

Before POSNER and EASTERBROOK, *Circuit Judges*, and PARSONS, *Senior District Judge.**

EASTERBROOK, *Circuit Judge.* Bonnie Benzies, who holds a Ph.D. in psychology, was classified as a Psychologist III in the Illinois Department of Mental Health and Developmental Disabilities. She wanted a promotion to Supervising Psychologist I, a position with higher pay. Illinois civil service rules allow promotions to occur in two ways: competition to fill vacancies, and "upgrading" of a job to

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* The Hon. James B. Parsons, of the Northern District of Illinois, sitting by designation.

reflect more accurately the incumbent's tasks. Before she acquired her Ph.D. Benzies failed twice to obtain a competitive promotion, each time being assured that a Ph.D. was necessary. When she had obtained her Ph.D. she asked for a "job audit" as a foundation for upgrading. Civil service personnel audited her work, found that she was not supervising other psychologists, and concluded that she was not eligible for non-competitive promotion. Meanwhile the Department had promoted four male psychologists—two without Ph.D.s—through the non-competitive audit and upgrade process. Benzies quit in disgust and complained to the EEOC. After that agency issued her right-to-sue letter, she filed this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.

The district court held a bench trial and concluded that the Department had not engaged in intentional discrimination. The Department argued that the process of non-competitive upgrading is mechanical, that neutral rules govern who is promoted. Any psychologist with supervisory duties will be promoted; none without will be; the four men had supervisory duties, and Benzies did not, the Department insisted. The district court doubted this explanation but stated: "the court cannot say that it is more probably true than not true that the reasons advanced by the defendant for the promotion of [the four men] are pretext and were not sex-neutral."

Aware that such findings, even on the ultimate issue, are all but conclusive, see *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985), Benzies directs her fire against what she believes is a mistake of law in the district court's opinion. The court stated that the plaintiff "has the ultimate burden of persuading the court that the reasons advanced [for the decision under attack] are a pretext *and* that a substantial or motivating factor in the defendant's decision was discrimination and but for that discrimination, the plaintiff would have been appointed." (Emphasis added.) Benzies insists that *and* should have been *or*.

This does not make any difference. The district court concluded both that the reasons the Department gave were not pretexts and that the Department did not act with discriminatory intent. Conjunctive versus disjunctive became immaterial. Witnesses testified that the process of non-competitive promotion is mechanical. The district court expressed doubts, on which Benzies plays, but a doubt is not the same thing as a favorable finding. Neither finding is clearly erroneous.

Just in case, we add that Benzies is wrong on the law. The plaintiff must show that intentional discrimination caused the employer to take some unfavorable action. See *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Germane v. Heckler*, 804 F.2d 366, 368 (7th Cir. 1986). To have any hope of showing this, the plaintiff must puncture a neutral explanation the employer offers for its conduct. Benzies argues that if the plaintiff does so—in the argot, shows that the explanation is a "pretext"—then the district court must infer that the employer acted with discriminatory intent. Not so. A demonstration that the employer has offered a spurious explanation is strong evidence of discriminatory intent, but it does not compel such an inference as a matter of law. The judge may conclude after hearing all the evidence that neither discriminatory intent nor the employer's explanation accounts for the decision.

A public employer may feel bound to offer explanations that are acceptable under a civil service system, such as that one employee is more skilled than another, or that "we were just following the rules." The trier of fact may find, however, that some less seemly reason—personal or political favoritism, a grudge, random conduct, an error in the administration of neutral rules—actually accounts for the decision. Title VII does not compel every employer to have a good reason for its deeds; it is not a civil service statute. Cf. *Christie v. Foremost Insurance Co.*, 785 F.2d 584, 587 (7th Cir. 1986). Unless the employer acted

for a reason prohibited by the statute, the plaintiff loses. The failure of an explanation to persuade the judge supports an inference that a bad reason accounts for the decision, but it is not invariably conclusive; the presence of a sufficient explanation, however, is dispositive against the plaintiff. (A "sufficient" explanation is one that would produce the same decision whether or not the prohibited characteristic played some role.)

Benzies wants us to treat any failure of the employer's chosen explanation as leaving the prima facie showing of discrimination unrebutted, compelling judgment in the employee's favor. *Aikens* establishes, however, that after the case has been tried the apparatus of prima facie case and response is no longer determinative. 460 U.S. at 715. See also *Morgan v. South Bend Community School Corp.*, 797 F.2d 471, 480 (7th Cir. 1986). Once a disparate treatment case has been tried, the question that matters is whether the plaintiff established that the employer's use of a criterion forbidden by statute caused an adverse decision. So Benzies does not have a legal ground that compels the district court to reexamine its conclusions.

Although we conclude that the district court's findings are not clearly erroneous, we share that court's doubt about the Department's conduct. The Department has never had a female supervising psychologist, and the record would have supported a finding that Benzies got the runaround for reasons related to her sex rather than to her talents and accomplishments. The Department's defense at trial was that, when Benzies demanded a job audit, she was not supervising anyone. That may be true, but it does not explain why men were given supervisory tasks and women were not. A "neutral" rule paying supervisors more than other employees is not neutral in application if only men are given supervisory tasks. The conclusion that the decisions to upgrade the four men, and not Benzies, were correct under the rules given each employee's duties does not respond to a claim that the Department discriminated in the assignment of the supervisory duties that were indispensable to being promoted.

The district judge did not explicitly discuss the reasons the men were assigned the duties that made promotions possible, while Benzies was not. Much of Benzies's brief tries to show that she should have been given supervisory duties, making a promotion possible. Fed. R. Civ. P. 52(a) requires the district court to make findings on all contested issues that are important to the outcome. A review of the record in this case shows why the district court did not address this potentially dispositive question: it was not raised at trial. The pretrial orders do not mention, as issues for trial, disputes about the assignment of duties to the psychologists. The principal pretrial order, drafted by the Department, poses a series of questions about the nature of the audit and upgrade process. Benzies filed a supplemental pretrial order presenting one more question about the audit process. She did not ask the court to consider the assignment of duties. The pretrial order establishes the issues for decision, and it is too late for appellate counsel to reshape the case. See *Erff v. Markhon Industries, Inc.*, 781 F.2d 613 (7th Cir. 1986). If issues about the failure to assign supervisory duties to Benzies were before the district judge at all, they were presented too obliquely to require a response. Each party must sharpen his own claims; those left in amorphous form by counsel need not be honed and decided by the judge. Benzies is bound by the litigation strategy in the district court. The judge addressed and resolved the matters presented to him. We are not sure that Benzies received her due from the State of Illinois, but we have no doubt that she received her due from the district court.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 28, 1987.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. JAMES B. PARSONS, *Senior District Judge**

BONNIE J. BENZIES,

Plaintiff-Appellant,

No. 86-1240 vs.

ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois, Danville Division.
No. 82 C 2369—**Harold A. Baker,** *Judge.*

This cause was heard on the record from the United States District Court for the Central District of Illinois, Danville Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

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* Honorable James B. Parsons, Senior Judge, United States District Court for the Northern District of Illinois, sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

BONNIE J. BENZIES,

Plaintiff,

No. 82-2369 vs.

ILLINOIS DEPARTMENT OF MENTAL HEALTH & DEVELOPMENTAL DISABILITIES,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This is a suit brought under the provisions of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.* The plaintiff, Bonnie Benzies, complains that the defendant, Illinois Department of Mental Health & Developmental Disabilities (Department), discriminated against her because of her sex and failed to promote her to available positions but instead appointed male candidates. The defendant in explanation of advancing male candidates in preference to the plaintiff explains that its decisions were sex-neutral and that it was required to advance the male candidates by reason of personnel rules and civil service requirements in the State of Illinois. The plaintiff contends that the defendant's explanation is a pretext and that a motivating factor in the defendant's conduct was sexual preference for the male candidates. Jurisdiction is vested in the court under the provisions of 28 U.S.C. § 1343(4).

The plaintiff is a clinical psychologist. She became a registered psychologist in the State of Illinois on April 19, 1982. Her career in clinical psychology goes back to the year 1966 when she was first employed by the Illinois Department of Mental Health. She worked for the Depart-

ment from October of 1966 through August of 1973. She did consulting work in 1973 and 1974 and returned on October 19, 1976, to the Department as a Psychologist II at the Manteno Hospital in Kankakee County, Illinois. She remained at Manteno until she resigned on December 19, 1982, in protest over her failure to be advanced to the position of Supervising Psychologist I.

In December, 1977, the plaintiff was advanced from the position of Psychologist II to the position of Psychologist III by audit and upward allocation. In 1979 the plaintiff was assigned to Drake Ward at Manteno as a Psychologist III. She was a team leader, prepared master treatment plans for patients, performed psychological testing and functioned as a case manager for patients.

In 1978, the plaintiff applied for the position of Psychologist IV and was interviewed by Robert Wagner, a Department administrator, who told the plaintiff that a Ph.D. was required for that position. Plaintiff applied again in 1979 for the position of Psychologist IV and this time was interviewed by John Steinmast, a Department administrator, who told the plaintiff that two Ph.D.'s had applied for the vacancy of Psychologist IV and that she should not bother to pursue advancement without a doctorate. The plaintiff accepted the defendant's decisions not to advance her to Psychologist IV and continued to pursue her work on a Ph.D. in psychology. She also continued to work at Manteno as a Psychologist III while she completed her graduate work.

The plaintiff received both her master's degree and her Ph.D. in psychology from the Illinois Institute of Technology, Chicago, Illinois. She received her doctorate on December 19, 1980. She taught psychology courses at ITT while she was a graduate student and also taught at Chicago State University. She has published three articles in the professional literature of psychology.

The plaintiff's job performance evaluations describe her as a person who does excellent work. She gets along well with her fellow workers and relates exceptionally well

with patients. In fact, in the latter capacity, she is rated above any of the other psychologists who were working at Manteno at the time she was. Finally, she is a person who requires virtually no supervision and Ray Finkle, the person who nominally was supposed to be the plaintiff's supervisor, admitted that he did nothing by way of supervision except to look over her master treatment plans after she had written them.

Between August, 1981, and the middle of June, 1982, four men were advanced to the position of Supervising Psychologist I by audit and upward allocation while an audit was performed on the plaintiff's job and she was adjudged to be properly classified as a Psychologist III. It is this series of events upon which the plaintiff predicates her claim of discrimination.

On June 1, 1980, Dennis Headley became the administrator of Subregion 12 at Manteno.[1] Mr. Headley is not a clinician and his functions are purely administrative. On June 9, 1980, Ray Finkle was transferred into Subregion 12 from another section at Manteno and was assigned to the Drake Ward as a Psychologist IV. On February 13, 1981, Headley, acting for the hospital superintendent Rouse had a job description prepared on Finkle which indicated he was performing all the duties usually assigned to a Supervising Psychologist I. On cross-examination Mr. Headley gave an unconvincing explanation of how Finkle's job description happened to coincide with the job description of a Supervising Psychologist I. On February 20, 1981, a job audit was submitted to Mr. Finkle and although Mr. Headley disclaims any responsibility for the job audit being commenced, the court finds it is a fair inference from all the circumstances that the audit was solicited by Headley and Rouse and that Finkle was transferred into Subregion 12 with the specific intention of advancing him to the position of Supervising Psychologist I.

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[1] For administrative purposes the hospital was divided into subregions which reported to the hospital Superintendent.

It should be noted that both Ray Finkle and Jack Emmons[2] were registered psychologists in the State of Illinois even though they only had master's degrees. They had become registered psychologists before Illinois raised the educational requirement to a Ph.D. On August 19, 1981, Mr. Finkle received the results of his audit indicating that he was upwardly allocated to the position of Supervising Psychologist I. The other two men about whom the plaintiff complains, David Das and Fred Slate, received their Ph.D.s on August 19, 1981, and October 15, 1981, respectively. On December 19, 1981, both Slate and Das became registered psychologists in the State of Illinois after passing the examination for that position. It should be noted that the plaintiff did not become a registered psychologist until April 19, 1982. She had failed the examination the first time she took it due to difficulty with her eyesight. She had the difficulty corrected and successfully completed the examination on her second attempt.

The same day that Slate and Das became registered psychologists, December 19, 1981, the plaintiff filed a complaint with the Illinois Human Rights Commission claiming that she had been discriminated against on the basis of her sex and that as a result she had not been advanced to the position of Supervising Psychologist I. At the end of December, 1981, and in January, 1982, job audits were commenced on Das and Slate, who were Psychologist IIIs assigned to other subregions at Manteno.

In January a job description was completed on the plaintiff and an evaluation made. On March 19, 1982, the plaintiff received the results of her job audit which indicated she was properly classified as a Psychologist III. On June 19, 1982, both Das and Slate received the results of their

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[2] Jack Emmons was advanced by audit and upward allocation from Psychologist IV to Supervising Psychologist I. Emmons was in a different program from the plaintiff, and the plaintiff gave very little emphasis in her evidence and in her arguments to the significance of Emmons' advancement.

job audit indicating that they were functioning as Supervising Psychologist Is and they were upwardly allocated to those positions. On December 19, 1982, the plaintiff resigned her position and a year later Ray Finkle retired from the Department of Mental Health.

II.

The plaintiff has made out a *prima facie* case of sex discrimination by disparate treatment which is certainly not an onerous burden. She has shown that she is a female who applied for a position for which she was qualified and was refused appointment; that the position remained vacant and a male was subsequently appointed. *Sherkow v. State of Wisconsin Department of Public Transportation*, 680 F.2d 498, 502 (7th Cir. 1980). To sustain its burden of coming forward, the defendant has articulated as a legitimate, non-discriminatory reason for failing to advance the plaintiff that the men who were advanced were required to be advanced by the Illinois Civil Service and Department of Personnel Regulations and that the decisions to advance the four men were sex neutral. *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1972). The plaintiff then has the ultimate burden of persuading the court that the reasons advanced are a pretext and that a substantial or motivating factor in the defendant's decision was discrimination and but for that discrimination, the plaintiff would have been appointed. *Burdine v. Texas Department of Community Affairs*, 450 U.S. 248 (1981).

None of the positions to which the four men were advanced were bid on an open competition basis. Instead the men were upwardly allocated as the result of a job audit performed by Central Management Services. The position of Supervising Psychologist I is a management position and it is not part of the bargaining unit under the Collective Bargaining Agreement that exists between the defendant and Manteno employees. Under personnel procedures governing the Department, an employee may

advance in two ways. First, if a vacancy occurs in a position, the defendant will accept applications to fill the vacancy and permit Department employees to bid on the job. Second, an employee may be assigned tasks which are properly performed by an employee of higher classification. In that event, a job audit by central management may be performed and if it is determined that the employee is discharging the duties of the higher classification then the employee will be advanced by upward allocation to the higher classification. No bidding is associated with an upward allocation. Applications are solicited only when a position is declared vacant.

How an upward allocation can be made without a preexisting, budgeted vacancy being in existence at the time of the upward allocation is not explained by the defendant. Finkle and Emmons had been classified as Psychologists IV which is the next position below Supervising Psychologist I although they did not possess Ph.D.s.[3] The qualifications for Supervising Psychologist I and Psychologist IV require that the incumbent supervise other psychologists. The record is not impressive about the amount of supervision rendered by Ray Finkle, but nonetheless, on paper, he did have the responsibility for supervising the plaintiff and a psychology intern, Cherri Coffman. It cannot be overlooked that Finkle and Emmons were registered psychologists in the State of Illinois although they had obtained their registration before the requirement for registration was possession of a Ph.D. Added to that, Finkle and Emmons had approaching thirty years of service with the Department of Mental Health and their seniority must have played a weighty part in the decision to advance them. Das and Slate, who were in different subregions from the plaintiff, were performing supervisory functions over other psychologists and had become registered psychologists in the State of Illinois before the plaintiff did. Plaintiff has asserted all along that

[3] The position of Psychologist IV apparently has been eliminated.

she was supervising other psychologists but the only basis for that assertion is that she had done some supervisory work with the psychology intern, Cherri Coffman. The record does not support the plaintiff's assertion that she was responsible for supervising Coffman. To the contrary, the credible evidence is that the plaintiff's supervision of Coffman was on an informal basis and was not part of the plaintiff's assigned work.

In conclusion, looking to the ultimate issue to be decided in the case, the court cannot say that it is more probably true than not true that the reasons advanced by the defendant for the promotion of Finkle, Emmons, Das, and Slate are pretext and were not sex-neutral. The court has suspicions about the promotion practices at the Manteno Hospital. The fact that no woman has been advanced beyond the clinical position of Psychologist III since the year 1929 stretched the court's credulity that during that whole period of time no woman engaged in clinical practice was qualified for the position of Psychologist IV or for the position of Supervising Psychologist I.

In the case of Finkle, it is possible that the defendant manipulated the personnel system to transfer him to Subregion 12 with the specific intent to advance him in preference to the plaintiff. But on the evidence in this record, while that intention is a possibility, the court cannot conclude that specific intention to discriminate against the plaintiff is more probably true than not true.

The plaintiff having failed to carry the burden of persuasion in the case, IT IS ORDERED that the Clerk enter judgment in favor of the defendant and against the plaintiff. Each party shall bear its own costs.

ENTER this 13th day of November, 1985.

/s/ Harold A. Baker
Chief U.S. District Judge

No. 86-1749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BONNIE J. BENZIES,

Petitioner,

vs.

ILLINOIS DEPARTMENT OF MENTAL HEALTH & DEVELOPMENTAL DISABILITIES,

Respondent.

BRIEF OF THE CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, WOMEN EMPLOYED, AND THE WOMEN'S BAR ASSOCIATION OF ILLINOIS AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CONSENT OF PARTIES

This brief is being filed on behalf of the Chicago Lawyers' Committee for Civil Rights Under Law, the Mexican American Legal Defense and Educational Fund, Women Employed and the Women's Bar Association of Illinois as amici curiae with the consent of all parties. Pursuant to Supreme Court Rule 36, petitioner's and respondent's letters of consent are being filed with this brief.

INTEREST OF AMICI CURIAE

The Chicago Lawyers' Committee for Civil Rights Under Law was organized in 1969 as one of many such committees throughout the country. Its purpose was and still is to involve private attorneys in an effort to ensure civil rights to all Americans. Over the past eighteen years, the Chicago Lawyers' Committee has enlisted the services of many hundreds of members of the private bar in providing legal representation to minorities, the poor, and the disadvantaged who are being deprived of their civil rights. The Chicago Lawyers' Committee has represented the interests of women, blacks and Hispanics in numerous class actions relating to employment discrimination, voting rights, equalization of municipal services and school desegregation.

The Mexican American Legal Defense and Educational Fund is a national civil rights organization founded in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States.

Women Employed is a national organization of working women. It assists working women facing sexual discrimination and monitors the enforcement activities and policies of the Equal Employment Opportunities Commission and the Office of Federal Contract Compliance with regard to a broad range of employment discrimination issues.

The Women's Bar Association of Illinois (WBAI), established in 1914, has over one thousand members throughout the State of Illinois. The WBAI is concerned with a wide variety of issues that confront women, including the issue of employment discrimination.

Amici have a direct interest in the law governing the construction and application of Title VII of the Civil Rights Act of 1964 (Title VII). Amici and those individuals who Amici represent litigate under Title VII regularly and thus have a strong incentive to prevent diminution of the statute's powers as a source of redress for civil rights violations.

ARGUMENT

THE SUPREME COURT SHOULD GRANT BENZIES' PETITION FOR A WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS' DECISION UNDERMINES THE EFFECTIVENESS OF TITLE VII

In *Benzies v. Illinois Department of Mental Health & Developmental Disabilities*, 810 F.2d 146 (7th Cir. 1987), the Court of Appeals for the Seventh Circuit greatly restricted the availability of Title VII of the Civil Rights Act of 1964 as a remedy for employment discrimination by misconstruing the case law of this Court. The proper application of Title VII is of the utmost concern to members of racial, religious, national origin and gender groups whose lives in the workplace are impermissibly disrupted by the prejudicial conduct of their employers. The right to be free from discrimination in the workplace is basic. In order to preserve the full protective force of Title VII as intended by Congress, this Court should grant Benzies' petition and reverse the decision of the Court of Appeals.

The Court of Appeals' decision contravenes both the clear intent of Congress in enacting Title VII and the consistent interpretation of that statute by this Court. As this Court stated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973):

> [t]he language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.

Although Title VII was enacted to ensure the substantive right of all individuals to be free from discrimination in the workplace, the decision in *Benzies* dramatically reduces the likelihood of a plaintiff prevailing in a Title VII case.

Judge Easterbrook, writing for the court,* determined that:

> [a] demonstration that the employer has offered a spurious explanation is strong evidence of discriminatory intent, but it does not compel such an inference [of discrimination] as a matter of law. . . . The failure of an explanation to persuade the judge supports an inference that a bad reason accounts for the decision, but it is not invariably conclusive; the presence of sufficient explanation, however, is dispositive against the plaintiff. (A "sufficient" explanation is one that would produce the same decision whether or not the prohibited characteristic played some role.)

Benzies, 810 F.2d at 148. Thus, under *Benzies*, a plaintiff may no longer raise a legally compelling inference of discrimination by showing that the defendant's proffered explanation is unworthy of credence. Instead, a plaintiff who makes such a showing is also required to demonstrate directly that the defendant intentionally discriminated against him or her *and* that no other possible explanation could justify the employer's challenged action.

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* Judge Posner and Judge Parsons joined in the opinion with Judge Easterbrook.

Unless a plaintiff is fortunate enough to have overheard an unschooled employer brag of improper motivation, a plaintiff would be required to prove his or her case by an ultimately impossible process of elimination. A plaintiff must now anticipate and respond to every conceivable non-discriminatory explanation for the challenged action, even if unexpressed by the defendant and simply conceived by the court *sua sponte*. Judge Easterbrook thereby erects a difficult, if not insurmountable, hurdle for the Title VII plaintiff—a hurdle which conflicts with Congress' desire to ensure equality in the workplace.

The chilling effect of *Benzies* will severely deter potential plaintiffs from bringing Title VII lawsuits. In contemplating whether to file such a complaint, a plaintiff must evaluate not only the defendant's proffered explanation, but also any possible explanation that the trial court might conjure up for the defendant's conduct. A plaintiff stalwart and steadfast enough to undertake litigation is thereby faced with the unenviable prospect of preparing for a "*Benzies* trial," a trial requiring defense against the complete universe of potential non-discriminatory explanations for the employer's conduct.

Finally, the opinion in *Benzies* neglects the principle of *stare decisis*; it stands in stark contrast to this Court's clear holdings in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). In *Burdine*, this Court stated that a plaintiff could prevail in a Title VII case after successfully proving that the employer's explanation was pretextual:

> This burden [of proving pretext] now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination. [The plaintiff] may succeed in this either directly

> by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. *See McDonnell Douglas*, 411 U.S. at 804-805.

450 U.S. at 256. Predictably, a majority of circuits have faithfully applied the formula of the *McDonnell Douglas*, *Burdine* and *Aikens* rulings. *See, e.g., Schmitz v. St. Regis Paper Company*, 811 F.2d 131 (2d Cir. 1987); *Monroe v. Burlington Industries*, 784 F.2d 568 (4th Cir. 1986); *Sylvester v. Callon Energy Services, Inc.*, 781 F.2d 520 (5th Cir. 1986); *Tye v. Board of Education of Polaris Joint Vocational School District*, 811 F.2d 315 (6th Cir. 1987); *Kimborough v. Secretary of United States Air Force*, 764 F.2d 1279 (9th Cir. 1985); *EEOC v. Gaddis*, 733 F.2d 1373 (10th Cir. 1984).

In spite of the clarity of this Court's decisions, several circuits have misconstrued the *McDonnell Douglas* line of cases. Even in their misconstructions of Title VII, the circuits have been inconsistent. *See, e.g., White v. Vathally*, 732 F.2d 1037 (1st Cir. 1984) (A showing of pretext by the indirect method does not suffice to meet the burden of demonstrating discriminatory intent.); *Lewis v. University of Pittsburgh*, 725 F.2d 910 (3rd Cir. 1983), *cert. denied*, 469 U.S. 892 (1984) (A plaintiff must prove by the direct method that intentional discrimination was the "but for" cause of the challenged conduct.); *Conner v. Fort Gordon Bus Co.*, 761 F.2d 1495 (11th Cir. 1985). (Plaintiff must prove that the defendant's articulated reasons were not the sole cause of the discharge, but that discrimination made a difference in the decision.) Thus, Judge Easterbrook is not alone in his misconstruction of Title VII. Further, the confusion over the proper application of the *McDonnell Douglas* formula is most pronounced among those decisions that erroneously reject the concept

that a conclusive inference of discrimination can be established by the indirect method of proof.

The *Benzies* opinion is simply one in a series of significant steps in the erosion of the safeguards provided by Title VII. This continuing erosion is a compelling indication that this Court's decisions in *McDonnell Douglas*, *Burdine* and *Aikens* have provided insufficient guidance to the lower courts in interpreting Title VII. Although *Benzies* is a sex discrimination case, the decision affects all groups protected by Title VII. It is therefore critical to the ongoing vitality of Title VII that this Court reverse the opinion of the Court of Appeals in *Benzies* and reaffirm the viability of the indirect method of proving discrimination outlined in *McDonnell Douglas* and *Burdine*.

CONCLUSION

For these reasons, the Amici respectfully request that this Court grant Benzies her petition for a Writ of Certiorari.

Respectfully submitted,

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